Tan Kah Khiam v Liew Chin Chuan & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–678 OF 2001
GOPAL SRI RAM, HASHIM YUSOFF AND AZMEL JJCA
31 JULY 2006

Civil Procedure — Trial — Cross-examination — Admission obtained from defendants' witness during cross-examination by plaintiff — Whether such evidence may be used to prove plaintiff's case

Civil Procedure — Trial — Procedure — Application by plaintiff to reopen case — Criteria to be satisfied — Whether the criteria for permitting a party at a trial to reopen its case different from those that govern the jurisdiction of an appellate court to receive further evidence — Reasons for such difference

Civil Procedure — Trial — Procedure — Application by plaintiff to reopen case — Discretion of trial judge — How a reasonable tribunal would have exercised discretion

Tort — Defamation — Libel — Whether words "tea money" in the Malaysian context capable of bearing a defamatory meaning

Words and Phrases — 'Tea-money' — Defamation action

The plaintiff was a newspaper vendor. The first defendant was the chief editor of the second defendant's Chinese newspaper. The plaintiff's case was that the defendants had defamed him by publishing an article about him alleging that he (the plaintiff) had asked for 'tea money' to distribute the newspapers. He thus sued claiming damages for libel. At trial, the plaintiff's counsel after having called his evidence, closed the plaintiff's case. He did not however call a witness to prove the contents of the impugned article in the language of the court in English or Bahasa Malaysia. Realising his error, just after he had closed the plaintiff's case, the plaintiff's counsel applied to reopen his case to call the translator. At this juncture, defendants' counsel suggested that the defendants should first be permitted to present their evidence and close their case after which the plaintiff should file a formal motion to reopen his case. The High Court and the plaintiff's counsel accepted this suggestion. However, during the defendants' case, each time the plaintiff's counsel asked the defendants' witnesses during cross-examination about the defamatory meaning of the words in the impugned article, counsel for the defendants' raised an objection which was upheld by the High Court. Plaintiff's counsel only succeeded in obtaining an admission from one of the defendants' witnesses that the plaintiff had asked for 'tea

money'. When the plaintiff's counsel formally applied to reopen the plaintiff's client's case and to call the translator to formally prove the contents of the impugned article the application was opposed by the defendants' counsel and dismissed by the court. The defendants' counsel argued that the plaintiff should satisfy the three conditions set out in *Ladd v Marshall* [1954] 3 All ER 645. The plaintiff appealed.

Held, allowing the appeal:

(1) The plaintiff's counsel managed during cross examination, to obtain an admission from the defendants' witness that the plaintiff had asked for 'tea money'. That was sufficient proof of the plaintiff's averment that those words had been attributed to the plaintiff. In a civil case, one party's evidence is the other's as well. Thus, a plaintiff may rely on the defendant's evidence to prove his or her case. The converse is also true (see para 3); *M Mahadevan v S Lourdenadin* [1988] 2 MLJ 371 referred.

(2) The criteria for permitting a party at a trial to reopen its case for the purpose of either recalling a witness or calling fresh evidence are very different from those that govern the statutory jurisdiction of an appellate court to receive further evidence. They cannot be the same for the following reasons: Firstly, although an appeal is by way of rehearing, there are important constraints on an appellate court, such as the deference given by an appellate court to the audio-visual advantage enjoyed by the trial court. Secondly, the issue on an application to adduce further evidence before an appellate court is whether the party seeking to adduce it could not by reasonable diligence have obtained it for use at the trial. This is not an issue before the trial court. Thirdly, an application to adduce further evidence before an appellate court is temporally fixed. It is fixed at the point when all the evidence is in and the submissions are over and more importantly, the trial judge has pronounced his views on the evidence before him. On the other hand at the trial stage, temporally speaking whether the trial judge will exercise his discretion to permit the reopening of a party's case depends on the stage at which the application is made. The exercise of the trial judge's discretion depends on the justice of the case, having regard to the peculiar facts and circumstances before the court. The trial judge must also be given very wide discretion on matters relating to evidence (see para 6); *Ong Yoke Eng & Anor v Lim Ah Yew* [1982] 1 MLJ 226; *Yah bte Aji v Fatimah bte Hj Mohamed Arifin & Ors* [1969] 2 MLJ 186; *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41; *TD Canada Trust v McMaster et al* [2003] BCD (Civ) 16394; *Lubrizol Corp v Imperial Oil Ltd* 62 ACWS (3d) 902; *Doyle v Olby (Ironmongers) Ltd* [1969] 2 All ER 119; *Tenaga Nasional Bhd v Prorak Sdn Bhd & Anor* [2000] 1 MLJ 479 referred.

(3) This was a case in which the judge had given no reasons for exercising her discretion in the way in which she did. The Court of Appeal's role was thus much wider in the instant case than in the usual discretion case where reasons are given. Here, the Court of Appeal could look at all the facts and see how a reasonable tribunal would have acted in their face. Here, a reasonable tribunal would have rejected the defendants' illogical suggestion and proceeded to deal with the plaintiff's application to reopen his case at the time before the

defendants began their defence. A reasonable tribunal would have had the interests of justice as the overriding consideration in its mind and taken into consideration the principle that as far as is possible a litigant should not be punished for the error of his or her counsel. In the instant case, a reasonable tribunal armed with all the relevant material would have permitted the plaintiff to reopen his case (see para 15).

(4) In the instant case, the words 'tea money' in the Malaysian context are indeed capable of bearing a defamatory meaning because they connote a solicitation of a bribe and hence dishonesty (see para 17).

(5) In the instant case, the plaintiff was not applying to recall his witness. The witness he wanted to call had not given evidence as yet. In other words he wanted to call a witness and not to recall a witness already called. The principle as to the recall of witnesses is the same in both civil and criminal cases that is a witness may be recalled whenever it is essential to the just decision of the case (see para 20); *Public Prosecutor v Boo Chew Hia* [1963] MLJ 33 referred.

[Bahasa Malaysia summary

Plaintif adalah penjual suratkhabar. Defendan pertama merupakan ketua penyunting suratkhabar tersebut. Kes plaintif ialah defendan-defendan telah memfitnahkannya dengan menerbitkan suatu rencana tentang plaintif mengatakan bahawa plaintif telah meminta 'tea money' untuk mengedarkan suratkhabar-suratkhabar. Plaintif mendakwa menuntut pampasan kenyataan bertulis (libel). Pada perbicaraan, peguam plaintif telah memanggil buktinya dan kemudiannya menutup kesnya. Tidak sekali pun semasa perjalanan kesnya plaintif memanggil saksi untuk membuktikan kandungan rencana yang dipersoalkan tersebut dalam bahasa mahkamah (Bahasa Inggeris atau Bahasa Melayu). Sejurus selepas kesnya ditutup, peguamcara plaintif sedar akan kesilapannya. Beliau memohon untuk membuka semula kes plaintif untuk memanggil seorang penterjemah. Pada saat tersebut, peguamcara untuk defendan-defendan menyatakan bahawa defendan-defendan harus dibenarkan untuk membuka, mengemukakan bukti mereka dan selepas penutupan kes mereka, plaintif sepatutnya memfailkan satu usul secara rasmi untuk membuka semula kesnya. Di perbicaraan, Mahkamah Tinggi dan peguam plaintif menerima cadangan tersebut. Pada setiap kali peguamcara plaintif bertanya tentang maksud pernyataan berfitnah yang terkandung di dalam rencana tersebut, peguamcara defendan membangkitkan bantahan yang dibenarkan oleh hakim perbicaraan. Peguam plaintif hanya berjaya mendapatkan pengakuan daripada salah satu saksi-saksi defendan bahawa plaintif telah meminta 'tea money'. Pada penutup kes plaintif, peguamcaranya telah memohon melalui satu usul secara rasmi untuk membuka semula kes anakguamnya dan untuk memanggil penterjemah untuk membuktikan secara rasmi kandungan rencana yang dipersoalkan tersebut. Permohonan tersebut ditentang oleh defendan-defendan dan dibatalkan oleh mahkamah. Peguamcara defendan mempertikaikan bahawa plaintif patut memenuhi kesemua keperluan di *Ladd v Marshall* [1954] 3 All ER 645. Plaintif merayu.

Diputuskan, membenarkan rayuan tersebut: A

(1) Peguamcara plaintif telah berjaya, ketika soal balas, untuk memperoleh satu pengakuan daripada saksi defendan-defendan bahawa plaintif telah meminta 'tea money'. Itu merupakan bukti yang mencukupi atas penegasan plaintif bahawa perkataan-perkataan tersebut datangnya daripada plaintif. Dalam kes sivil, keterangan satu pihak juga merupakan keterangan pihak yang lain. B Dengan itu, plaintif dapat bergantung atas keterangan defendan-defendan untuk membuktikan kesnya (lihat perenggan 3).

(2) Kriteria untuk membenarkan satu pihak dalam perbicaraan membuka semula kesnya bagi tujuan sama ada memanggil semula saksi ataupun mengemukakan C keterangan baru adalah berlainan dengan bidang kuasa statutori rayuan mahkamah untuk menerima keterangan baru. Ia sebenarnya tidak sama. Pertama, jikalau rayuan adalah melalui perbicaraan semula, terdapat beberapa sekatan ke atas mahkamah rayuan seperti kelebihan yang diberikan oleh Mahkamah Tinggi kepada audio visual yang dinikmati oleh mahkamah D perbicaraan. Kedua, isu untuk memohon keterangan selanjutnya di hadapan mahkamah rayuan adalah sama ada pihak yang ingin menuntutnya tidak dapat melalui 'reasonable diligence' mendapatkannya untuk keperluan perbicaraan. Ini bukan merupakan satu isu untuk diperbicarakan. Ketiga, permohonan untuk mengemukakan keterangan selanjutnya di hadapan mahkamah rayuan telah ditetapkan buat sementara. Ia telah ditetapkan apabila kesemua E keterangan telah diterima dan kesemua hujahan telah selesai dan yang penting sekali, hakim perbicaraan telah menyampaikan pendapatnya terhadap keterangan tersebut di hadapan beliau. Sebaliknya di peringakt perbicaraan, sama ada hakim akan menggunakan budi bicaranya untuk membenarkan pembukaan semula kes suaut pihak bergantung pada tahap mana permohonan F tersebut dibuat. Pelaksanaan budi bicara bergantung kepada keadilan kes tersebut setelah mempertimbangkan fakta-fakta dan keadaan-keadaan tertentu di hadapan mahkamah. Hakim perbicaraan mesti juga diberikan budi bicara yang luas berkenaan keterangan (lihat perenggan 6); *Ong Yoke Eng & Anor v Lim Ah Yew* [1982] 1 MLJ 226; *Yah bte Aji v Fatimah bte Hj Mohamed Arifin & Ors* [1969] 2 MLJ 186; *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ G 41; *TD Canada Trust v McMaster et al* [2003] BCD (Civ) 16394; *Lubrizol Corp v Imperial Oil Ltd* 62 ACWS (3d) 902; *Doyle v Olby (Ironmongers) Ltd* [1969] 2 All ER 119; *Tenaga Nasional Bhd v Prorak Sdn Bhd & Anor* [2000] 1 MLJ 479 dirujuk.

(3) Ini adalah satu kes di mana hakim perbicaraan tidak memberikan sebarang H alasan dalam pelaksanaan budi bicaranya. Peranan Mahkamah Rayuan adalah lebih luas dalam kes ini berbanding dengan budi bicara kebiasaan kes di mana sebab-sebab diberikan. Di sini, Mahkamah Rayuan boleh melihat kesemua fakta-fakta dan bagaimana satu tribunal yang munasabah telah bertindak. Di sini, tribunal yang munasabah boleh menolak cadangan defendan yang I tidak logik dan meneruskan untuk mengurus permohonan plaintif bagi membuka semula kes tersebut pada masa sebelum defendan memulakan pembelaannya. Suatu tribunal yang munasabah akan mempunyai kepentingan keadilan sebagai pertimbangan paling utama dan mempertimbangkan prinsip bahawa seboleh-bolehnya seseorang litigan tidak sepatutnya dihukum atas

kesilapan peguamcaranya. Dalam keadaan sebegini, satu tribunal yang munasabah yang mempunyai kesemua bahan yang relevan sebelum hakim perbicaraan akan membenarkan plaintif membuka semula lagi kesnya (lihat perenggan 15).

(4) Dalam kes ini, perkataan 'tea money' di dalam konteks Malaysia sememangnya membawa maksud fitnah kerana ia menampakkan satu rasuah dan penipuan (lihat perenggan 17).

(5) Dalam kes ini, plaintif tidak memohon untuk memanggil balik saksi-saksi. Saksi yang dipanggil oleh plaintif tidak memberikan keterangan lagi. Dalam perkataan lain, plaintif menghendaki untuk memanggil saksi dan tidak memanggil saksi yang sudah dipanggil. Prinsipnya terhadap pemanggilan saksi-saksi adalah sama di dalam kes-kes sivil dan jenayah, iaitu saksi boleh dipanggil apabila ia diperlukan untuk menentukan keputusan yang adil (lihat perenggan 20); *Public Prosecutor v Boo Chew Hia* [1963] MLJ 33 dirujuk.]

Notes

For a case on cross-examination, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index para 6871.

For cases on libel, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 314–434.

For cases on trial procedure, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 6905–6906.

Cases referred to

Chow Yee Wah & Anor v Choo Ah Pat [1978] 2 MLJ 41 (refd)

Doyle v Olby (Ironmongers) Ltd [1969] 2 All ER 119 (refd)

Ladd v Marshall [1954] 3 All ER 745 (refd)

Lau Foo Sun v Government of Malaysia [1970] 2 MLJ 70 (refd)

Lubrizol Corp v Imperial Oil Ltd 62 ACWS (3d) 902 (refd)

M Mahadevan v S Lourdenadin [1988] 2 MLJ 371 (refd)

Ng Hong Choon v Timbalan Hal Ehwal Dalam Negeri & Anor [1994] 3 MLJ 285 (refd)

Ong Yoke Eng & Anor v Lim Ah Yew [1982] 1 MLJ 226 (refd)

TD Canada Trust v McMaster et al [2003] BCD (Civ) 16394 (refd)

Tenaga Nasional Bhd v Prorak Sdn Bhd & Anor [2000] 1 MLJ 479 (refd)

Yah bte Aji v Fatimah bte Hj Mohamed Arifin & Ors [1969] 2 MLJ 186 (refd)

Legislation referred to

Evidence Act 1950 s 138(4)

Appeal from: Suit No S4–23–116 of 1993 (High Court, Kuala Lumpur)

PS Ranjan (A Kailesh with him) (Kailesh Aru & Co) for the appellant.

Mubashir bin Mansor (Ahmad Feisal bin Ahmad Rosli with him) (Skrine) for the respondents.

Gopal Sri Ram JCA (delivering judgment of the court): A

[1] This is the plaintiff's appeal against the judgment of the High Court dismissing his claim for damages for an alleged libel committed on him by the defendants. The appeal was allowed and a retrial ordered at the close of arguments. B
Two points were argued; one procedural, the other substantive. I will deal with each. But first here are the facts.

[2] The plaintiff was a newspaper vendor. He distributed Chinese newspapers. C
One of the newspapers he distributed was the *Sin Chew Jit Poh*. It was published by the second defendant. The first defendant was the paper's chief editor. The newspaper sold for 60 sen a copy and the plaintiff received a commission of 18 sen. Later, the second defendant introduced a coupon system to replace the payment of commission. Apparently it was financially less advantageous than the commission system. The plaintiff was unhappy. He asked to be compensated. The defendants D
published an article about the plaintiff. It was in the Chinese language. In other words, it was in a foreign language, that is to say in a language other than the language of the court. The plaintiff's case is that the second defendant's article had alleged that the plaintiff had asked for 'tea money' to distribute the second defendant's newspaper. He said it was defamatory of him. He brought an action E
claiming damages for libel.

[3] Eventually, the plaintiff's action came on for trial. What transpired at that trial constitutes the procedural point. Here is how it emerged. The plaintiff called his evidence and then closed his case. Nowhere during his case did the plaintiff call a F
witness to prove the contents of the impugned article in the language of the court. That would have been either in the English language or Bahasa Malaysia. Just after he had closed his case, counsel for the plaintiff realised his error. He applied to reopen the plaintiff's case to call the translator. At that point in time, counsel for the defendants made a singularly unhelpful, unwise and erroneous suggestion that was G
proven to be seriously prejudicial to the plaintiff's case. He said that the defendants should be permitted to open, present their evidence and then close their case and that the plaintiff should then file a formal motion to reopen his case. Surprisingly counsel for the plaintiff accepted this suggestion. So did the court. Counsel for the plaintiff and the court probably did not realise the serious injustice the plaintiff was bound to H
suffer by the course suggested by the counsel for the defendants. It meant that the plaintiff would be precluded from putting his case on the true meaning of the words 'tea money' to the defendants' witnesses. And that is precisely what happened. On each occasion that counsel for the plaintiff asked about the defamatory meaning of the words appearing in the article, counsel for the defendants raised an objection I
which was upheld by the trial judge. But, entirely to the credit of the plaintiff's counsel, he managed, during cross examination to obtain an admission from the defendants' witness that the plaintiff had asked for 'tea money'. That in my view was sufficient proof of the plaintiff's averment that those words had been attributed to the plaintiff. In a civil case, one party's evidence is the other's as well. So, a plaintiff may

rely on the defendant's evidence to prove his or her case. The converse is also true (see the observations of Hashim Yeop A Sani SCJ in *M Mahadevan v S Lourdenadin* [1988] 2 MLJ 371).

[4] At the close of the defendant's case, plaintiff's counsel applied by way of a formal notice of motion to reopen his client's case and to call the translator to formally prove the contents of the impugned article. That application was opposed by the defendants and dismissed by the court. No reasons have been given by the learned judge for refusing the plaintiff's application. But we have the benefit of the note of the defendant's argument. It is an argument that was repeated before us. The defendants say that a plaintiff who wishes to reopen his case must satisfy the three conditions laid down by Denning LJ in *Ladd v Marshall* [1954] 3 All ER 745. These were set out by Suffian FJ (later Lord President) in *Lau Foo Sun v Government of Malaysia* [1970] 2 MLJ 70 as follows:

> This is an application for an order that the plaintiff or appellant be at liberty upon the hearing of his appeal to adduce further evidence.
>
> To justify the reception of this evidence three conditions must be fulfilled:
>
> First, it must be shown that the evidence could not have been obtained with reasonable diligence *for use at the trial*;
>
> Second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive;
>
> Third, *the evidence must be such as is presumably to be believed*, or in other words, it must be apparently credible, although it need not be incontrovertible (Emphasis added.)

[5] In support of his submission, counsel for the defendants relied on two authorities.The first of these is *Yah bte Aji v Fatimah bte Hj Mohamed Arifin & Ors* [1969] 2 MLJ 186. that was an action concerning the ownership of land. The defendant, after she had closed her case, applied to call further evidence. Plaintiff's counsel objected but to quote from the judgment 'otherwise produced no authority in support of his opposition'. This is an important feature of that case. Because, the views expressed by the learned judge on the issue of re-opening by a party of his or her case were not the product of sufficient assistance from counsel. In the very difficult position in which the learned judge found himself in that case he did the best he could and applied *Ladd v Marshall*. Here is the passage on which reliance was placed by counsel for the defendants in the present appeal:

> After due consideration, I take the view that if under certain conditions, further evidence was allowed to be adduced on appeal, such evidence should under the same conditions be adducible at the hearing in the first instance, even though the side seeking to adduce such evidence had closed its case. An appeal is always by way of rehearing and if such evidence is let in at the appellate stage where the case is being reheard, I for one can see no justification for its exclusion when the case is being heard.
>
> These conditions have been stated in many authorities. I take the statement of Denning LJ (as he then was) in the case of *Ladd v Marshall* [1954] 1 WLR 1489 (at p 1491) as being, with respect, the most succinct:
>
> To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable

> diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

[6] With respect, I am unable to accept the reasoning of the learned judge in the foregoing passage. In my judgment, the criteria for permitting a party at a trial to reopen its case for the purpose of either recalling a witness or calling fresh evidence are very different from those that govern the statutory jurisdiction of an appellate court to receive further evidence. Indeed they cannot be the same as I shall try to demonstrate. In the first place, although an appeal is, as observed by the learned judge in *Yah bte Aji*, by way of rehearing, there are important constraints on an appellate court (see *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41 at p 42. Such constraints include the deference given by an appellate court to the audio-visual advantage enjoyed by the trial court. These constraints are absent at a trial. The trier of fact is yet to see and hear the witness whose evidence it is sought to be adduced by a re-opening of the case. In the second place, the issue on an application to adduce further evidence before an appellate court is whether the party seeking to adduce it could not by reasonable diligence have obtained it for use at the trial. This does not enter at all into the equation before the trial court. In the third place, an application to adduce further evidence before an appellate court is temporally fixed. That is to say, it is fixed at the point when all the evidence is in and the submissions are over and more importantly, the trial judge has pronounced his views on the evidence before him. What an applicant for further evidence at the appellate stage seeks to do is to persuade the court hearing the appeal that if the trial judge had the further evidence before him, he may, or even would, have come to a different conclusion. But that is not the position at the trial. For temporally speaking, whether the trial judge may exercise his discretion to permit the reopening of a party's case will very much depend on the stage at which the application is made. It may be more likely that discretion may be exercised at the stage where the application is made immediately after a party closes his case. But it may be less likely that discretion will be favourably exercised where the application is made after the defendants have closed their case and just before the trial judge is about to pronounce his judgment. In the spectrum of factual possibilities that exist between each of these two extremes the exercise of discretion would, in my judgment, very much depend as to where the justice of the case lies having regard to the peculiar facts and circumstances before the court.

[7] In contradistinction to the decision in *Yah bte Aji*, Arulanandom J in *Ong Yoke Eng & Anor v Lim Ah Yew* [1982] 1 MLJ 226 held (so far as is material to the present instance) that:

> In civil proceedings, it is in the discretion of the court of first instance to recall a witness or call further witnesses after his case is closed. Although under ordinary circumstances it may not be necessary or permissible … unforeseen situations may develop and there may be also inadvertent omissions.

[8] In my judgment, the better view is that expressed in *Ong Yoke Eng*. A trial judge must be given a wide discretion on matters relating to evidence. After all, the

Evidence Act 1950 itself places the matter of relevance and therefore admissibility upon the court for it provides as follows in s 136(1):

> When either party proposes to give evidence of any fact, the court may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the court shall admit the evidence if it thinks that the fact, if proved, would be relevant, and not otherwise.

[9] The view I have to make is supported by the decision in *TD Canada Trust v McMaster et al* [2003] BCD (Civ) 16394, where Garson J said:

> In *Dudas v Munroe* [1993] BCJ 2035 (SC) (QL), Braidwood J (as he then was) summarised the law concerning the court's discretion to re-open a trial before judgment is entered as follows:
>
> In deciding whether or not to re-open a case, the governing considerations are first, would a miscarriage of justice probably occur without a re-hearing; and second, would a re-hearing probably produce a change of result?. The discretion to re-open a trial before judgment is entered is an unfettered discretion but one that should be used sparingly (*Sykes v Sykes* (1995) 6 BCLR (3d) 296 (CA)) and has as its purpose the correction of what would otherwise be a miscarriage of justice (*Kemp v Wittenberg,* 1999 BCJ 810 (SC))

[10] Again in *Lubrizol Corp v Imperial Oil Ltd* 62 ACWS (3d) 902, the Federal Court of Appeal of Canada (Stone, Linden and McDonald JJA) when dealing with the point under discussion said (in the joint judgment of Stone and Linden JJA):

> Save in exceptional circumstances, a litigant who has had a full opportunity of adducing evidence at trial will not be permitted to reopen his case so as to allow new evidence to be introduced after the judgment at trial. [*Becker Milk Co Ltd et al v Consumers' Gas Co* (1974) 2 OR (2d) 554 (CA)]. It has been well observed that as under our adversary system of justice, 'what witnesses are called and what questions they are asked is a matter left to counsel' and it is counsel who 'makes decisions, both strategic and tactical, as to what approach will be taken..... counsel cannot later complain about the absence of evidence at trial.' [*International Corona Resources Ltd v LAC Minerals Ltd* (1988) 66 OR (2d) 610. The case at bar, it seems to us, does present a somewhat unusual situation. It is not the normal case where all of the issues are defined by the pleadings and there has been full discovery of documents and of witnesses on the issues so defined in advance of the trial. Nor is it a case where a party seeks to reopen after the trial has ended and judgment has been pronounced by the trial judge on the issue to which the new evidence relates.
>
> It is a long standing principle that the object of courts is to decide the rights of the parties in litigation and not to punish for mistakes made in the conduct of a case unless the circumstances be exceptional. That principle was expressed in the following way by Bowen LJ in *Cropper v Smith* (1884) 26 Ch D 700 at p 710:
>
> Now, I think it is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy.

While Bowen LJ wrote in dissent of how the particular case ought to be decided, the principle, in our view, remains good law (see *Shoe Machinery Company v Cutlan* ([1896] 1 Ch 108 (CA) at pp 112, 115; The Supreme Court Practice 1993, Vol 1, Part I (London: Sweet & Maxwell 1992), at pp 371–372). The case itself was concerned with whether a pleading should be amended on an appeal, and while the principle is of particular relevance in cases involving amendment of a pleading it has received broader application. Thus in *Wood v British Columbia Electric Railway Company Limited* (1925) 34 BCR 527 (SC) at p 530, it was applied in rejecting an argument put forward at the end of a trial that the plaintiff could not recover damages because he was not the proper party to the action.

[11] To what their Lordships said in *Lubrizol Corp*, I would add the words of Lord Denning MR in *Doyle v Olby (Ironmongers) Ltd* [1969] 2 All ER 119 which we applied in *Tenaga Nasional Bhd v Prorak Sdn Bhd & Anor* [2000] 1 MLJ 479 at p 483:

Whenever possible, where there is no risk of sacrifice of principle in the name of justice or at the altar of convenience, we do our best to ensure that a lay client does not suffer because of the mistake of his legal advisers. We do so in the interest of justice. When we act, we always bear in mind what Lord Denning said in *Doyle v Olby (Ironmongers) Ltd* [1969] 2 All ER 119 at p 121:

We never allow a client to suffer for the mistake of his counsel if we can possibly help it. We will always seek to rectify it as far as we can. We will correct it whenever we are able to do so without injustice to the other side. Sometimes the error has seriously affected the course of evidence, in which case we can at best order a new trial.

We have intervened where counsel makes an erroneous admission of law (see *Lee Hock Ning v Government of Malaysia* [1972] 2 MLJ 12. But it is not possible where our decision would be in defiance of established principle or where an injustice visited upon the other side (see *Visia Finance Bhd v Expert Credit & Leasing Sdn Bhd & Ors* [1998] 2 MLJ 705.

[12] The other authority relied on by the defendants is *Ng Hong Choon v Timbalan Hal Ehwal Dalam Negeri & Anor* [1994] 3 MLJ 285. That was a habeas corpus case in which the High Court admitted corrective and additional evidence by means of supplementary affidavits exhibiting documents tendered by the respondents after the detenu's counsel had closed his case and commenced his submissions. It was held that the affidavits were wrongly admitted. Wan Yahya SCJ when delivering the judgment of the Supreme Court said:

It would suffice if we were to reiterate the principle that the admission of such evidence is only confined to circumstances where the evidence sought to be adduced is raised ex impromptu or that such evidence was not available with reasonable diligence at the time when the evidence of both parties had been closed (see *Yah bte Aji v Fatimah bte Haji Mohamed Ariffin & Ors* [1969] 2 MLJ 186; *Kesarmal & Anor v Valliappa Chettiar* [1954] MLJ 119; *Balfour v PP* [1949] MLJ Supp 8; *R v Day* [1940] 1 All ER 402; *Ladd v Marshall* [1954] 3 All ER 745; [1954] 1 WLR 1489).

Ng Hong Choon is readily distinguishable. That was a case in which corrective affidavits were put in after the detenu's counsel had commenced his submissions. That is not the case before us. Here, the application was initially made by the plaintiff at the close of his case. If defendants' counsel had been less helpful than he was, the judge would have ruled on that application. But, the defendants having misunderstood the law misled themselves, their opponent and the court albeit with

no ill intention. Should they be allowed to benefit from the harm they caused? I think the answer to that question is quite obviously, 'No'. The second point about *Ng Hong Choon* is this. It was a case concerning the liberty of the subject. Upon an issue of such importance courts adopt a most strict approach. For those who seek to deprive an individual of his or her freedom must justify that deprivation upon the clearest of grounds and the law affords them no leeway, no flexibility to manoeuvre themselves into a better position than that in which they found themselves by a breach of the practice concerning the delivery of evidence. That this was indeed the overriding consideration comes across from the following passage in the judgment of Wan Yahya SCJ (at p 292):

> We consider that in a motion for a habeas corpus application which is normally heard on affidavit evidence, the general principle of practice requires that both parties file their affidavits within such time as the court may allow which is usually two days before the date of hearing. It is only at the conclusion of the pleadings or in our present motion, at the close of the evidence that the court proceeds to hear the submissions and make a finding by due consideration of affidavit evidence to determine the truth of the point in issue raised by the parties.
>
> In this case, the last affidavit was filed by the respondents on 24 December 1990, two days before the date fixed for hearing. Obviously the time for accepting affidavit evidence had been closed two days before the hearing date, ie on 24 December 1990, when the respondents' last affidavit was filed and as there was no indication by the appellant to file any reply to the respondents' affidavit, the court had proceeded to consider the merit of the motion on 26 December 1990 on the fundamental ingredient of all the affidavit evidence before it.
>
> On the basis of the affidavit evidence, as recorded, and as it stood before the court at the hearing on 26 December 1990, it cannot be disputed that the defect in PPKP Osman's affidavit in failing to specify the actual date on which the report had been submitted to the Minister was fatal on the authority of *Tan Yap Seng v Ketua Polis Negara & Ors* [1991] 2 CLJ 1400 which was confirmed by the Supreme Court by the time the adjourned application of the applicant came up for hearing.

[13] So, you can see that was really a case of late delivery of affidavit evidence in a human rights case.

[14] Counsel for the defendants argued that the trial judge having exercised her discretion not to permit the plaintiff to reopen his case, we should not interfere with her discretion. But what counsel overlooks is that this is a case in which the judge has given no reasons for exercising her discretion in the way in which she did. So we cannot really gauge what it is that operated on her mind when she dismissed the plaintiff's application to reopen his case. This is accordingly a stronger case than one in which reasons are given. Were it otherwise, a judge at first instance will be able to insulate the exercise of his discretion from review by giving no reasons at all. That is not and cannot be justice according to the law. Our role, I think, is much wider in this case than in the usual discretion case where reasons are given. Here we can look at all the facts and see how a reasonable tribunal would have acted in their face. And there is no question that a reasonable tribunal would have rejected the defendants' illogical suggestion and proceeded to deal with the plaintiff's application to reopen his case at the time before the defendants began their defence. A reasonable

tribunal would have had the interests of justice as the overriding consideration in its mind and taken into consideration the principle that as far as is possible a litigant should not be punished for the error of his or her counsel. In that state of affairs, a reasonable tribunal armed with all the relevant material that was before the trial judge would have permitted the plaintiff to reopen his case. Especially so as the defendants would have suffered no prejudice in real terms by the grant of the application. Also time and costs would have been saved. And the trial could have proceeded with smoothly.

[15] At the conclusion of arguments my learned brothers and I were satisfied that an injustice was occasioned to the plaintiff by the court acceding to the defendants' suggestion. Look at how clumsily the trial proceeded because of what had happened. As I have already said, the plaintiff's cross examination of the defendants' witnesses was hampered. And what would have happened assuming that the judge had allowed the plaintiff's application to reopen his case after the defendants had closed their case and permitted him to call his evidence? It would have meant the defendants reopening their case and the plaintiff having to re-cross-examine the defendants' witnesses all over again. With respect, I cannot think of a more cumbersome, expensive and confusing way of conducting a trial.

[16] With that I turn to consider the substantive point. It is quite short. The issue is whether the allegation that the plaintiff asked for 'tea money' is capable of bearing a defamatory meaning. I am in agreement with the observation made by my learned brother Azmel JCA during argument that those words 'tea money' in the Malaysian context are indeed capable of bearing a defamatory meaning because they connote a solicitation of a bribe and hence dishonesty. Counsel for defendant, in response to my learned brother repeated the point he had already made, namely, that the plaintiff had failed to prove the translation. And, as I have already pointed out earlier in this judgment, the answer to counsel lies in the answers given under cross-examination by his clients' witness. I do not think it serves much purpose to say anything more on this subject by reason of the orders we made on the appeal.

[17] Having regard to the procedural injustice that the plaintiff suffered in the circumstances of this case, an order of re-trial was the most appropriate to make. Defendants' counsel opposed a retrial on all issues because one of his witnesses who gave evidence at the first trial is dead. He says that a full re-trial would occasion an injustice to his clients. But I think it is hardly open to him to complain. After all he is the author of the difficulties that were visited upon the plaintiff's head. I may say here that given the fact that the court was moved after the defendants had closed their case (as suggested by counsel for the defendants) it comes as no surprise that the trial judge was minded to dismiss the application. It would have meant unravelling quite a bit of the defendants' case by ordering the recall of their witnesses. As I said, it would have been rather clumsy. It may well have been different if the plaintiff's application had been heard at the close of his case. In that event, the balance of justice would plainly have turned in the plaintiff's favour as what he was trying to do was to remedy his counsel's oversight in not calling the translator.

[18] One last point. Counsel for the defendants made a sustained submission on the discretion of a judge to permit a party to recall a witness after the close of his case. He reads to us *Shedden v Patrick* (1869) LR 1 HL Sc 470 and *Pernas Trading Sdn Bhd v Senali Construction Works Sdn Bhd* [1991] 2 CLJ 1587 which are authorities for the proposition that the court must be slow to permit the recall of a witness after the cases of both parties have concluded. I accept, of course that the power to permit the recall of a witness is in the discretion of the court as provided by s 138(4) of the Evidence Act 1950 which reads:

> (4) The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination and if it does so, the parties have the right of further cross-examination and re-examination respectively.

[19] But if I may say, with respect, all this has nothing whatsoever to do with the present case. If you look carefully enough, you will see that the plaintiff was not applying to recall his witness. The witness he wanted to call had not given evidence as yet. In other words, he wanted to call a witness and not to recall a witness already called. The point appears to have escaped the defendants. In any event, the principle as to the recall of witnesses is the same in both civil and criminal cases. And all I really need do is to quote from the judgment of Ali J (as he then was) in *Public Prosecutor v Boo Chew Hia* [1963] MLJ 33:

> The law permits a witness to be recalled whenever it is essential to the just decision of the case. Merely recalling a witness is not in itself an irregularity.

[20] For the reasons already given, the appeal was allowed and a retrial was ordered. All costs incurred up to date, including the costs of the first trial, were directed to follow the event of the re-trial. The deposit was ordered to be refunded to the appellant.

[21] My learned brothers, Hashim Yusoff and Azmel JJCA (now FCJJ) have seen this judgment in draft and have expressed their agreement with it.

Appeal allowed.

Reported by Sally Kee